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No. _____

SEP 29 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

72-525

OCTOBER TERM, 1972

DONALD S. COOPER
Petitioner,

versus

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
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DONALD S. COOPER,
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versus

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE
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THE TENTH CIRCUIT

COMES NOW the Petitioner, DONALD S. COOPER, by and through his attorney, CARL L. HARTHUN, ESQ., and does hereby respectfully pray that this Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals in and for the Tenth Circuit rendered July 12, 1972, with denial of petition for rehearing on August 25, 1972.

REPORT OF OPINIONS

The Opinion of United States Court of Appeals for the Tenth Circuit rendered in this case has not, as yet, been officially reported. Said opinion is reproduced in the Appendix to this Petition commencing at Page A-1.

Pursuant to Supplement to Petition for Rehearing the Circuit Court of Appeals in and for the Tenth Circuit revised a portion of its Opinion and said revision is likewise set forth in the Appendix to this Petition at p. A-20.

Petitioner was initially convicted in the United States District Court in and for the District of Colorado for Misapplication of Bank Funds in violation of Title 18 U.S.C. §656 and Conspiracy to Misapply Bank Funds in violation of Title 18 U.S.C. §371. Trial was to a jury and the trial Court rendered no opinion. Judgment of conviction entered upon verdicts of guilty on 1 count of conspiracy and 3 counts of misapplication of bank funds.

JURISDICTION

Writ of Certiorari is herein sought to review the judgment of the Circuit Court in and for the Tenth Circuit of July 12, 1972, as revised, Petition for rehearing having been denied on August 25, 1972. Mandates have been stayed pending the filing of this Petition in this Court, and the jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Are the provisions of Title 18 U.S.C. §656 vague and indefinite so as to violate the express provisions of the Fifth and Sixth Amendments to the Constitution of the United States of America?

2. Does due process require the reporting of Grand Jury proceedings so that the same may

be transcribed, if necessary, for use in the proceedings following the rendition of any indictment?

3. Is it an abuse of discretion to fail to sever one defendant from another when, less than one (1) week prior to the trial, a co-defendant and his daughter are arrested in a highly publicized narcotics raid.

4. Is the requirement of due process violated by precluding a defendant in a criminal case from testifying, under threat of contempt, to the criminal conviction of a co-defendant which directly caused the defendant seeking to testify to take certain specific actions which are used by the prosecution in sustaining the criminal charge of misapplication of funds and conspiracy to misapply funds?

5. Can an Indictment alleging a general conspiracy be sustained by proof, at most, of a series of separate and distinct transactions possibly constituting conspiracies in and of themselves?

CONSTITUTIONAL PROVISIONS

Amendment V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . nor shall any person . . . be deprived of life liberty or property, without due process of law. . ."

Amendment VI

"In all criminal prosecutions the accused shall enjoy. . . trial by an impartial jury of

the State and District where the crime shall have been committed. . . and to be informed of the nature and cause of the accusation. . ."

STATUTES INVOLVED

1. Title 18 U.S.C. § 656 covering theft, embezzlement, or misapplication of bank officer or employee as set forth in the Appendix hereto at p. A-23.

2. Title 18 U.S.C. §371 regarding conspiracy set forth in the Appendix hereto at p. A-24.

3. Title 18 U.S.C. §3500 concerning demands for production of statements and reports of witnesses as set forth in the Appendix hereto at p. A-25.

4. Title 18 U.S.C. §3481 regarding the competency of the accused as set forth in the Appendix hereto at p. A-27.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

1. Rule 6(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the Grand Jury other than its deliberations and the vote of any juror may be made to the attorneys for the Government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the Grand Jury only when so directed by the Court preliminarily to or in connection with a judicial proceeding or when permitted by the Court at the request of the

Defendant upon his showing that grounds may exist for a Motion to Dismiss the Indictment because of matters occurring before the Grand Jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The Court may direct that an Indictment shall be kept secret until the Defendant is in custody or has given bail, and in that event the Clerk shall seal the Indictment and no person shall disclose the finding of the Indictment except when necessary for the issuance and execution of a warrant or a summons.

2. Rule 7(c) Nature and Content. The Indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged...

3. Rule 14 Relief from Prejudicial Joinder. If it appears that a Defendant or the Government is prejudiced by a joinder of offenses or of Defendants in an Indictment or information or by such joinder for trial together, the Court may order an election or separate trials of Counts, grant a severance of Defendants or provide what other relief justice requires... .

STATEMENT OF THE CASE

This matter had its commencement before the United States District Court in and for the District of Colorado pursuant to a Grand Jury Indictment alleging violations of Title 18 U.S.C. §§656 and 371. The initial Indictment was superseded by a subsequent Indictment correcting material defects of the original Indictment and containing Counts I, V, VIII, and IX upon which this Petitioner was convicted, all remaining Counts were either not applicable to this

Petitioner, dismissed by the Court or terminated by jury acquittal. The superseding Indictment charged, inter alia, Francis R. Salazar and George I. Norman as co-defendants with the Petitioner.

The proceedings before the indicting grand jury were not reported and thus no transcript of proceedings before the grand jury was available to the Petitioner for any purpose whatsoever.

The Co-Defendant Salazar maintained a large building for offices and containing, on the lower level, separate apartments constituting private living quarters for third parties. Within a few days prior to the commencement of the trial in the District Court, there was a raid upon the aforesaid building located at 1601 West Evans Avenue, Denver, Colorado, resulting in the arrest of various persons, including the Co-Defendant Salazar and his daughter, and resulting in a search of the entire premises and seizure of certain contraband narcotics from the separate living quarters of third parties as aforesaid. These activities were conducted by both federal and State law enforcement officers and received extensive publicity, both in print and pictures in local newspapers and on local television channels and radio stations. The local news media had likewise extended coverage to the proceedings pursuant to the Indictment in this matter, and the general public was well informed that this Petitioner and his Co-Defendant Salazar were pending trial under the Superseding Indictment in said case. In one instance, the newspaper article covering the aforesaid narcotics raid and arrests was placed next to an article announcing that the trial with respect to the instant matter was scheduled to

commence the following Monday, naming all of the Defendants including Francis R. Salazar and your Petitioner.

A Motion for Severance due to the aforementioned transaction was filed by this Petitioner and denied by the trial Court. During the conduct of its voir dire examination of the prospective jurors, no questions were propounded by the Court touching upon the immediately recent transaction and publicity regarding the Co-Defendant Salazar.

Testimony at trial reflected that parties with substantial personal assets and unquestioned financial strength borrowed monies from the Rocky Mountain Bank of Lakewood, a State Chartered Bank, and then loaned those proceeds to businesses in which the Petitioner had an interest at a time when the Petitioner was a director of the lending bank.

Officers and directors of the bank were not precluded from borrowing monies from the bank, however, there were statutory limitations placed upon the extent of such borrowings.

The Co-Defendant Norman had previously been convicted of state charges involving other separate and distinct transactions, and that conviction likewise received extensive publicity in the Denver Metropolitan area and more particularly the area of the suburb of Lakewood, Colorado where the Rocky Mountain Bank of Lakewood was located and transacted its business. This conviction was under review by the Colorado Supreme Court at the time of trial in this proceeding. The conviction was ultimately reversed by the Colorado Supreme Court a considerable time after the conclusion of the trial in this matter. This Petitioner sought to

testify concerning his particular actions brought out by the prosecution. He would have testified that the reason for such actions was the conviction of Mr. Norman in that the Rocky Mountain Bank of Lakewood was engaged in numerous and diverse business transactions with Mr. Norman at the time of his trial and conviction. This business and banking relationship was well known in the business community of the bank, and Petitioner's actions were taken in an effort to minimize as much as possible the impact of such conviction upon the bank. The Petitioner was precluded by the Court, under threat of contempt, from making any reference to the conviction of Mr. Norman in the State Court and was only allowed to allude to a "certain occurrence" which caused him to take certain actions.

Count I of the Superseding Indictment alleges a general conspiracy, and the subsequent individual counts spanning a period of slightly less than two (2) years were relied upon as overt acts of that general conspiracy.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED

I.

THE QUESTION OF THE LEGAL SUFFICIENCY OF TITLE 18 U.S.C. §656 AND THE CONFUSION ARISING THEREUNDER CONSTITUTES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Title 18 U.S.C. §656 reads as follows:

"Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve Bank,

member bank, national bank or insured bank. . . willfully misapplies any of the monies, funds or credits of such bank. . . shall be fined not more than Five-Thousand Dollars or imprisoned not more than five (5) years, or both. . . ."
(Emphasis supplied).

Penal statutes historically require certain and express language with the result that ordinary men may govern their behaviour thereby. A jury must also be able to either comprehend or be advised as to the particular elements of the offense specifically and accurately. Likewise, a criminal defendant has the constitutional right to be advised as to the nature of the charge against him. It is respectfully submitted that Title 18 U.S.C. §656 is vague and indefinite in that it does not meet the aforementioned requirement. The term "wilfully misapplied" has no subtle meaning. Batchelor vs. United States, 166 U.S. 426 39 L.Ed. 478, 15 S.Ct. 446; United States vs. Northway, 129 U.S. 327, 30 L.Ed. 664, 7 S.Ct. 580 (1895).

The case largely relied upon to sustain convictions for misapplication of bank funds is United States vs. Fortunato, 420 F.2d 79 (CCA 2d, 1968) where loans were made to fictitious borrowers with forged signatures. This was not the circumstance in the instant case in that the loans made by the Rocky Mountain Bank of Lakewood were made to substantial qualified borrowers (an unchallenged fact) who in turn voluntarily disposed of those loan proceeds to companies, enterprises or businesses wherein this Petitioner had an interest.

In Bishop vs. United States, 16 F.2d 406 (CCA 8th, 1926), the case involved an

accommodation borrower. In the instant case, substantial qualified borrowers were involved, disposing of the loan proceeds as they saw fit. Thus, the Statute in question and its more specific requirement of wilful misapplication has run the gamut from what would clearly be a practically unanimous situation of wilful misapplication (Fortunato) to highly questionable circumstances that it is argued do not constitute any criminal act as in the instant case. This situation stresses the precise necessity for entry of this Court into the picture so as to once and for all determine standards to apply to the construction of the words "wilfully misapplied" or strike down the provisions as being vague and indefinite. Perhaps the difficulty with respect to this section is further highlighted by problems in instructing the jury.

The Court in the instant case defined "misapplication" as follows:

> "Misapplication under the Statute with which we are concerned may be committed in either of the following ways: First, by an officer or director of an insured bank causing the loan to be made for his own benefit and concealing his interest in the loan from the bank, or, secondly, by an officer or director of the bank causing the loan to be made and knowingly concealing from the bank the identity of the true borrower."

This is not the definition of misapplication as it does not contain the requirement that the same must be calculated to injure or defraud the bank. Long vs. United States, 24 F.2d 946 (CCA 8th, 1928); Laws vs. United States, 66 F.2d 870 (CCA 10th, 1943).

Due to the confusion with respect to this question among the Courts, the general principles and concepts set forth in the Fortunato case, supra, have been distorted and improperly implied to subsequent cases, including the instant case, under circumstances where the Fortunato rationale based upon the particular facts of the case do not apply if the criminal law is to be interpreted in a well reasoned context.

Prosecutions under this Section have proliferated across this country and such proliferation has been made possible by virtue of distortion of the law arising from and out of the vague and indefinite terminology in the Statute and the present case presents an appropriate format for a constitutional determination regarding Title 18 U.S.C. §656.

II.

THE QUESTION OF NECESSITY FOR REPORTING OF GRAND JURY PROCEEDINGS SHOULD BE DECIDED SO AS TO STANDARDIZE PROCEDURE AMONG THE VARIOUS FEDERAL COURTS AND THEREBY RESULT IN AN EQUAL APPLICATION OF THE LAW THROUGHOUT THE FEDERAL JURISDICTION.

The proceedings before the Grand Jury resulting in the initial Indictment and Superseding Indictment in this case were not reported. A Defendant in a criminal case is accorded the right to indictment by grand jury pursuant to provisions of the Fifth Amendment of the Constitution of the United States of America. This right has been perpetuated by virtue of the provisions of Rule 6(e) of the Federal Rules of Criminal Procedure which grant a defendant

access to grand jury proceeding. Further, Title 18, U.S.C. §3500 grants the Defendant in a criminal case access to statements of a witness made to a grand jury for use by said defendant at trial.

Prior to trial this Petitioner sought grand jury transcripts, and at hearing upon said motion, the United States Attorney advised the Court that:

> "There are no minutes and there was no reporter present at the time of presentation of this matter except to three individuals who were subpoenaed to bring records. . ."

Rule 6(e) of the Federal Rules of Criminal Procedure provides that the Court may, at the request of the defendant, permit disclosure of proceedings before the grand jury. The rule contemplates that there will be an adequate record of such proceedings.

Rule 6(c) requires that the foreman or other juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the Clerk of the Court, but the record shall not be made public except on order of the Court. These requirements have been interpreted as being mandatory. See Wright, Federal Practice and Procedure, Volume 1, page 160, Indictment and Information, Section 103:

> "Rule 6(d) provided that a stenographer or operator of a recording device may be present while the Grand Jury is in session. This presupposes that a verbatim transcript may be made of the evidence before the Grand Jury. To make such a transcript is clearly, as has been said, "the better procedure" but courts passing on

> the question have held without exception thus far that it is not required that such transcript be made. This result is probably in accord with the intention of the advisory committee that drafted the rules. A member of that committee stated shortly after the rules were adopted that "in most districts no stenographic record is made of this testimony before a Federal Grand Jury". If this is the rule, it ought to be changed, either by amendment or by judicial construction. The Supreme Court has emphasized the importance to the defense of the access to the transcript of Grand Jury proceedings. A defendant cannot have that advantage if the proceedings go unrecorded."

Wright, Federal Practice and Procedure, Volume 1, page 161, Indictment and Information, Section 103, citing United States vs. Hensley, 374 F.2d 341, 352; United States vs. Cianchetti, 315 F.2d 584, 591; United States vs. Weathers, 21 F.Supp. 763, 765; Wyatt vs. United States (10th Circuit, 1968) 388 F.2d 395 (contra).

Dennis vs. United States, 385, U.S. 855, 16 L.Ed.2d 973, 86 S.Ct. 1840 (1966), together with the liberalized pattern of criminal discovery and the discretionary language of Rule 6(e) of the Federal Rules of Criminal Procedure, render it persuasive that a defendant in a criminal case should have access to the grand jury minutes and transcriptions resulting in his indictment. Even Milton vs. United States, 398 F.2d 321 (C.A. 19th 1968) recognizes a limited opportunity for access to grand jury minutes and testimony. It is respectfully submitted that this is a significant retreat from the hard line in Pittsburgh Plate Glass Company vs. United

States, 360 U.S. 395, 3 L.Ed.2d 1323, 79 S.Ct. 1237 (1959). In light of the rules and cases previously cited, it is indicated that if such matter should be available to the defense in a criminal case that steps should be taken to see that such proceedings are at least recorded, for in absence thereof there can be absolutely no access whatsoever. Unless the steps are taken to provide, or at least have available, Grand Jury minutes and transcripts, this approach cannot be fulfilled. See Cargill vs. United States, 381 F.2d 849 (C.A. 19th 1967), cert denied, 389 U.S. 1041, 19 L.Ed.2d 831, 88 S.Ct. 781.

It is respectfully submitted that it is now time to declare that grand jury minutes must be kept not only according to the mandates of Rule 6 of the Federal Rules of Criminal Procedure, but also that grand jury proceedings must be recorded so that transcriptions thereof may be made available if the criteria for such production are met.

In the instant case, witnesses appeared and testified at the grand jury proceedings and also appeared and testified at trial. Under these circumstances the Petitioner would have had the benefit of Title 18 U.S.C. §3500 if the Grand Jury proceedings had been recorded. He was denied this substantial right solely on the ground that the proceedings were not recorded. If a criminal defendant is fortunate enough to be indicted in a district where Grand Jury proceedings are recorded then he has the benefit of the provisions of Rule 6 of the Federal Rules of Criminal Procedure and Title 18, U.S.C. §3500. If a criminal defendant, such as the Petitioner herein, is unfortunate enough to be indicted in a district where such proceedings are not reported then he is denied these benefits. The end result

is an unequal application of the law and the situation cries out for uniformity in favor of the recording of Grand Jury proceedings, an issue properly before this Court for its determination.

III.

PREJUDICIAL PRE-TRIAL PUBLICITY OCCURRING IMMEDIATELY ON THE EVE OF TRIAL AND CONCERNING A CO-DEFENDANT SHOULD HAVE EFFECTED SEVERANCE, AND FAILURE TO GRANT THE SAME WAS VIOLATIVE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND CONSTITUTED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO REQUIRE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

On or about November 25, 1970, Petitioner's Co-Defendant Salazar and his daughter were arrested during the course of a narcotics raid and seizure within the particular building housing the Co-Defendant's offices together with living quarters of other third parties. This arrest received wide-spread publicity in the Denver Post and Rocky Mountain News from and after November 25, 1970 and immediately prior to the commencement of the trial in these proceedings. Radio and television broadcasts carried the same story, and there was photographic coverage in the newspapers.

On November 30, 1970, this Defendant filed his Motion for a Continuance of Trial or Severance based upon the aforesaid transaction. Attached to the Motion were excerpts from the aforementioned newspapers which made specific

reference not only to the narcotics raid and arrests but also to the trial of this case which was scheduled to commence and did commence Monday, November 30, 1970. The Motion was denied by the Court.

The Court conducted the voir dire examination of the prospective jurors. The trial court did not examine the prospective jurors as to their knowledge of the circumstances around the transaction involving the Co-Defendant Salazar. The arrest of Salazar and his daughter, the extensive pre-trial publicity given thereto, the close proximity in time to the commencement of trial in the instant case (five days), the publicity that this trial had prior to its commencement and the proximity of publicity concerning the Salazar transaction to an article making reference to the commencement of trial in this matter naming the individual Defendants, and the lack of inquiry of prospective jurors as to their knowledge in the matter resulted in a failure to protect this Petitioner from unfavorable prejudicial pretrial publicity and avoided a determination as to the extent thereof. Sheppard vs. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600; Estes vs. Texas, 381 U.S. 532 85 S.Ct. 1628, 14 L.Ed.2d 543.

IV.

THE TRIAL COURT'S IMPROPER LIMITATION UPON THE TESTIMONY OF THE PETITIONER AT TRIAL WAS VIOLATIVE OF PETITIONER'S RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND REPRESENTED A SERIOUS DEPARTURE FROM THE USUAL COURSE OF

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JUDICIAL PROCEEDINGS SO AS TO CALL FOR EXERCISE OF THIS COURT'S POWER OF SUPERVISION TO INSURE A FAIR AND IMPARTIAL TRIAL PURSUANT TO DUE PROCESS OF LAW.

The defendant Donald S. Cooper asserted that much of his behaviour relied upon by the U.S. as evidence of criminal acts was precipitated by and performed in response to a situation existing in Jefferson County and arising out of the rather notorious conviction of his co-defendant, George I. Norman, in September, 1966.

The Court was made aware of the intention of defendant Donald S. Cooper to give such testimony and directly precluded him from doing so. It is urged that such prohibition operated during the course of trial to deny the defendant Donald S. Cooper the right to present his case. The following colloquy took place prior to the testimony from Defendant Donald S. Cooper:

"Mr. Harthun:

> I communicated to the Court earlier the discussion which I had with my client. As far as his attitude, it has not changed. He indicates he feels the truth should be brought out as to why he got involved in the matter.

The Court:

> I am going to take him into chambers and give him some advise about contempt."

(Vol. X, p. 1883, Original Transcript)

The position of defendant Donald S. Cooper was fully stated to the Court and explored in camera (Vol. X, p. 1888, et seq., Original Transcript; Vol. XI, pp. 1910-1927, Original Transcript).

These offenses required the specific intent to defraud the Rocky Mountain Bank of Lakewood, and any evidence of defendant Donald S. Cooper as to his intent when performing any of the acts or transactions asserted by the prosecution is of utmost significance and importance in that it goes to the very basic foundation of the entire offense. Long vs. United States, 24 F.2d 946 (C.C.A. 8th, 1928); Laws vs. United States, 66 F.2d 870 (C.C.A. 10th, 1943).

V.

THIS COURT'S DECISION IN KOTTEAKOS VS. UNITED STATES, 328 U.S. 750, 66 S.Ct. 1239, 19 L.Ed. 1557 (1946) WAS DISREGARDED BY BOTH LOWER COURTS IN PERMITTING A CONVICTION FOR THE GENERAL CONSPIRACY UNDER COUNT I BASED UPON EVIDENCE OF SEPARATE AND DISTINCT LOAN TRANSACTIONS.

Count I of the Superseding Indictment alleges a general conspiracy and sets forth as overt acts the same transactions alleged in the remaining substantive Counts of the Superseding Indictment.

A reading of the transcript in these proceedings will show that over the span of time wherein certain transactions alleged took place, namely, from October 7, 1965 through April 13, 1967, there was no connection of transactions nor common thread or scheme or combination of defendants so as to establish the single overall conspiracy that was charged in Count I of the Indictment. As a matter of fact, the various transactions were solely and totally isolated and involved some singularly different parties, and, when in fact, common parties did exist, there was absolutely no sufficient evidence from which

a reasonable inference could be drawn that they were connected by any plan or scheme to wilfully misapply or cause to be misapplied monies of the Rocky Mountain Bank of Lakewood with the intent to injure and defraud said Bank. In Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946) the Court recognized that there were numerous separate and independent groups with no common connection with each other, even though they dealt independently with a unifying agent, and that the proof, therefore, admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the Indictment.

It is urged by this defendant that the case of United States vs. Varelli, 47 F.2d 35 (1969), 7th Circuit, is extremely persuasive on this point. In that case the defendants were convicted of a single conspiracy, as here. The Court stated that agreement is the primary element of conspiracy and it may be shown if there is a concert of action, all of the parties working together understandingly, with a single design for the accomplishment of a common purpose. But where various defendants separately conspire with a common conspirator to obtain fraudulent loans from an agency of the United States, there are several conspiracies since there is no overall goal or common purpose and each has its own distinct improper end. In that case the Government failed to prove an overall general scheme, and it is asserted that in this case the Government has likewise failed to prove an overall general scheme. The Court found the criminal hijackings sufficiently related to allow joinder for trial purposes, but held there was not sufficient evidence to conclude there was one overall conspiracy.

It is also interesting to note that the Court in Kotteakos, supra, said it was possible for the jury to determine that the defendants were part of a common plan and scheme where none was shown by the proof and to further impute to each defendant acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some. Clearly, this situation occurred in the case at bar due to the myriad of transactions presented allegedly in aid of proving the conspiracy of Count I where the overt acts were the selfsame transactions which constituted the substantive counts of the Indictment, which counts did not name the alleged conspirators.

Really, the tactic followed served its purpose in that it allowed much hearsay, irrelevant and immaterial evidence in against the individual defendants under the guise of its admissibility as to the conspiracy in Count I. It is most naive to believe that any juror in this case could keep separate and distinct in his or her mind the conspiracy count as opposed to the substantive counts when the overt acts of the conspiracy count are identical to the substantive counts of the Indictment and when the evidence submitted to prove both is identical.

If the Government proved anything, it proved separate and distinct transactions as alleged in the substantive counts of the Indictment and not a general overall conspiracy as alleged in Count I of the Indictment. In practically every particular, the defects that existed in the Kotteakos and Varelli cases appeared in the instant case, and the failure and refusal of the

District Court and the Court of Appeals to follow the clear direction of those cases should be persuasive upon this Court to issue its Writ of Certiorari in this matter.

CONCLUSION

It has been called to the attention of counsel for the Petitioner that other Petitions are being filed with respect to Co-Defendants and other Appellants in the proceedings in the lower Courts, and to the extent applicable this Petitioner would seek to incorporate by reference the questions presented by other Petitioners to the extent that they are applicable to him.

The United States Court of Appeals in and for the Tenth Circuit has stayed mandate in these proceedings pending ruling of this Court on this Petition and it is respectfully prayed that this Court issue its Writ of Certiorari directed to the Judgment of the United States Court of Appeals in and for the Tenth Circuit for the reasons and upon the grounds presented.

Respectfully submitted,

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(303) 222-4665

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY, 1972, TERM

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	Nos. 71-1168
v.	)	71-1169
DONALD S. COOPER,	)	71-1170
FRANCIS R. SALAZAR,	)	71-1171
PAUL E. COOPER,	)	71-1172
DELMAR E. COOPER, and	)	
GEORGE I. NORMAN, JR.,	)	
Defendants-Appellants.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(District Court No. 70-CR-58)

Carl L. Harthun (Robert L. Pitler, on the brief), Denver, Colorado, for Defendant-Appellant Donald S. Cooper; Charles S. Vigil (Francis R. Salazar, pro se, on the brief), Denver, Colorado, for Defendant-Appellant Francis R. Salazar; James W. Creamer (Thomas J. Mitchell, on the brief), Denver, Colorado, for Defendant-Appellant Paul E. Cooper; Harold L. Davison, Aurora, Colorado, for Defendant-Appellant Delmar E. Cooper; Shirley P. Jones, Jr., Salt Lake City, Utah, (James J. Morrato, Denver, Colorado, on the brief), for Defendant-Appellant George I. Norman, Jr.;

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Milton C. Branch, Assistant United States Attorney (James L. Treece, United States Attorney, on the brief), Denver, Colorado for Plaintiff-Appellee.

Before BREITENSTEIN, HILL and McWILLIAMS, United States Circuit Judges.

HILL, Circuit Judge.

These are direct appeals from convictions of Donald, Delmar and Paul Cooper and Francis Salazar, as principals, and of George Norman, as aider and abettor for alleged misapplication of moneys of a statuorily defined member bank in violation of the 18 U.S.C. §656 and §2.

Twelve counts of the thirteen count indictment returned by the grand jury charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement of funds of the member bank. The first count of that indictment charged all the appellants with conspiracy to defraud the United States in violation of 18 U.S.C. §371 and listed twelve transactions constituting eleven of the substantive counts as overt acts of the conspiracy. Five of the substantive counts were otherwise disposed of by dismissal or severance and were not considered by the jury. Of the remaining counts, guilty verdicts were returned under count one, the conspiracy charge, against Delmar and Donald Cooper and Salazar; against all three of the Coopers and Salazar on count five; and against Delmar and Donald Cooper and George Norman on counts eight and nine.

The Coopers and Salazar were officers and directors of the Rocky Mountain Bank at

Lakewood, Colorado, the "member bank" through which the alleged misapplication was committed. The scheme allegedly used involved the securing of borrowers by the Coopers and Salazar who would apply for loans from the Rocky Mountain Bank. The loan application would be presented to and approved by the Loan and Discount Committee of the bank, the membership of which was partially comprised of various of the Coopers and Salazar. The loan proceeds were then paid the borrower by Donald or Delmar Cooper acting as an officer of the bank. The borrower would endorse the loan proceeds check and return it, usually to either Donald or Delmar Cooper. This money was then used for the private investment purposes of the Coopers and Salazar.

The charge against Norman is substantially similar with the exception that he was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank. It is the government's contention that Norman, like the Coopers and Salazar, secured people who would apply for loans from the Rocky Mountain Bank, and after approval and payment of the loan proceeds would deliver the money to Norman for use by him in his own business ventures. The link connecting Norman as an aider and abettor and co-conspirator is supplied, according to the contention of the government, by the appearance of Donald and Delmar Cooper as officers of one of the business interests of Norman. The government also contends part of the proceeds of the loans made in connection with Norman were used by Donald and Delmar Cooper to acquire an interest in one of the Norman enterprises.

These schemes, according to the government, faltered when certain of the loans were reviewed by federal banking officials. It was apparently thought by appellants that scrutiny could be avoided by removing these loans from their status in the bank as outstanding loans. To accomplish this, the Denver Revival Tabernacle, a Cooper-owned establishment, was transferred to the Rocky Mountain Bank in exchange for certain of the suspect loans. The government contends the value assigned the Tabernacle property in the exchange transaction was grossly over valued, thereby causing a great financial loss on the loans by the exchange transaction.

Each of the appellants questions the sufficiency of evidence to sustain his conviction. A synopsis of the evidence adduced on each count on which convictions were ultimately returned is dispositive. Count five of the indictment charged that the three Coopers and Salazar, as officers and/or directors of the bank, made a $65,000 loan to Harvey Alpert and Michael Cooper which was used for the benefit of the Coopers and Salazar. Alpert testified that he and Michael Cooper obtained the loan together, with a note from Donald and Delmar Cooper guaranteeing repayment. He testified they delivered the loan proceeds to Donald and Delmar Cooper and were told the money was to be used to pay an obligation owned by them at another bank. He testified there were renewal notes made on the loan and that neither he nor Alpert had ever made any payments on the loan. He also testified that at the time of the original loan he knew the loan proceeds were to go to Donald and Delmar Cooper.

A summarization of the transaction was given by an F.B.I. agent on the basis of his analysis of bank records and accounting entries. He testified the $65,000 loan proceeds were disbursed on February 17, 1966, by a Rocky Mountain Bank cashier's check signed by Donald Cooper. After endorsement by Alpert and Michael Cooper, the check was deposited to the trust account of Salazar at another bank on the same day. On February 21, 1966, a check dated February 17, 1966, payable to Denver Revival Tabernacle for $55,000, was charged against Salazar's trust account. This check was endorsed by Delmar Cooper and used together with a $3,775.18 Rocky Mountain Bank cashier's check issued February 17, 1966, payable to Donald Cooper, to purchase a Rocky Mountain Bank cashier's check on February 18, 1966, for $58,775.18 payable to Donald Cooper. The Denver Revival Tabernacle account received $55,938.76 from this cashier's check, and the remainder was returned to Donald Cooper by a $2,836.42 Rocky Mountain Bank cashier's check. Prior to the deposit of $55,938.76, the account ledger for the Tabernacle showed an overdraft of $182.39. On the same day this deposit was made, a $55,754.37 check to American National Bank was charged against the account. This check was a payment in full on a loan of the Tabernacle at that bank.

Repayment of the $65,000 loan to Alpert and Michael Cooper was also included in the F.B.I. agent's summarization. The first payment was a $5,000 Westland Industrial Bank cashier's check drawn on the Rocky Mountain Bank account and was charged to payment of interest on the loan. On March 3, 1967, the

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loan balance was paid off by a $56,633 check drawn on Paul Cooper's account at Rocky Mountain Bank payable to that bank. There was also a renewal of $5,000 of the principal on the original loan on March 3, 1967. Payments on the renewal loan were made reducing the balance to $3,000 when it was renewed again. The balance of this renewal on January 30, 1969, when the liquidator for the bank took control of the bank, remained at $3,000. This was subsequently paid in full by Donald Cooper's attorney.

The agent's summarization further disclosed the source of funds for the $56,633 payment by Paul Cooper on March 3, 1967, was a loan made by the Rocky Mountain Bank for that same amount on March 2, 1967. This loan was subsequently renewed and the proceeds used to pay the original loan. Ten payments were made leaving the loan balance on December 24, 1968 at $58,028.06 plus $303.45 interest. The balance of this loan was then included and paid in full in the transfer of the Denver Revival Tabernacle property to the Rocky Mountain Bank.

The conspiracy count alleged twelve overt acts, the same acts charged in eleven of the substantive counts. A detailed narrative is unnecessary other than to say the evidence disclosed transactions similar to that detailed previously; that is, borrowers would be secured and loans made with the loan proceeds being delivered to various of the appellants. Transactions were also alleged in which loans were made to allow purchase of a business enterprise by some of the appellants, then loans were made directly to that business.

Violation of 18 U.S.C. §656 is distinctly limited as to "the class of persons who can violate its provisions, i.e., officers, directors, agents, employees, etc." United States v. Tornabene, 222 F.2d 875, 877 (3d Cir. 1955). The evidence adduced at trial clearly shows that the three Coopers and Salazar were definitely within that class. The offense of "misapplication occurs when an officer of a bank knowingly lends money to a fictitious borrower or causes the loan to be made to his own benefit, concealing his interest from the bank." United States v. Fortunato, 402 F.2d 79, 81 (2d Cir. 1968), cert. denied, 394 U.S. 933. There was ample evidence to support the jury's conclusion that the Coopers and Salazar were receiving the benefits of loans without disclosing the fact. There was also ample evidence to support the conclusion that Donald and Delmar Cooper and Salazar acted in concert in committing the offenses. The convictions returned under counts one and five do not fail for lack of proof.

We now turn to the questioned sufficiency of evidence on the verdicts returned under counts eight and nine charging Donald and Delmar Cooper with misapplication and George Norman with aiding and abetting the misapplication in violation of 18 U.S.C. §2. The two counts charged that two $81,000 loans, one to a Mr. Cloyd Wangsgard and one to Lakewood Medical Center, were made to borrowers secured by Norman and the proceeds used by Norman in his own business enterprises, and also were used by the two Cooper brothers to acquire an interest in one of Norman's businesses. The evidence establishes that the proceeds of the loans were deposited to the Lakewood Medical Center.

account at the Rocky Mountain Bank on February 23, 1967. Two checks were written on that account on the same day. The first was a check for $37,199 payable to Greater Leasing Company. The second check was for $124,459.21 payable to Rocky Mountain Bank. Evidence, consisting of an application for assignment and transfer of a radio station license, clearly establishes that Donald and Delmar Cooper were directors of Greater Leasing Company on October 5, 1966, each owning 37.5% of the stock. The evidence further reveals the $37,100 deposit was the source of funds for two checks to pay loans charged in counts 6 and 7 which had been previously obtained by Jensen. A check for $28,179.68 to Rocky Mountain Bank was used to pay off the $28,000 balance of a $35,000 loan. The $35,000 loan was a renewal of a prior $25,000 loan made by Jensen at Norman's request as an accommodation for Salazar. A $7,056.73 check was used to pay off a $7,000 loan obtained by Jensen from Westland Industrial Bank. The proceeds of that loan had been paid to Jensen by a Westland Industrial Bank check signed by Donald Cooper. This check was then deposited by Jensen in his personal account in a Golden, Colorado, bank. At the same time, Jensen made a check payable to Rocky Mountain Bank for $7,000. This check had been used as a payment on the $35,000 loan, reducing that loan to $28,000. The $124,459.21 check, after being shunted through a complicated series of transactions, ultimately went to either Norman or his wife.

The aider and abettor may violate the statute by assisting a bank official in committing

the misapplication.[1] Additionally, it must be shown the misapplication was for the benefit of the bank officer or the aider and abettor.[2] The evidence clearly establishes that the loans made to the borrowers secured by Norman were made in part for the benefit of the Coopers. The fact that Norman was not the named borrower in each of the loans does not serve to insulate him. The evidence discloses the active solicitation and securing of borrowers by Norman and renders the ultimate borrowers to be in realty Norman's alter-ego acting at his direction. Viewing the evidence in the light most favorable to the government, we cannot conclude the jury was unjustified in its guilty verdicts under counts 8 and 9.[3] Appellants raise a multitude of other arguments, many of which are asserted by all. The first argument is that 18 U.S.C. §656 is unconstitutionally vague and uncertain in its use of the term "willfully misapplies" which has no commonly accepted definition. In this context, they assert the statute punishes acts which are not clearly defined as violative of the statute. In United

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1/ "Essential to the crime of aiding and abetting a bank official in violating Section 656 is the guilt of the bank official." United States v. Tornabene, 222 F.2d 875, 878.

2/ See Hall v. United States, 286 F.2d 676 (5th Cir. 1960), cert. denied, 366 U.S. 910).

3/ United States v. Miller, ____F.2d____ (10th Cir. 1972).

States v. Archambault, 441 F.2d 281 (10th Cir. 1971), cert. denied, ____U.S.____, we dealt with the adequacy of the term "misapply", stating at 283, "'[T]he statutory concept of misapplication is not a vague word of such uncertain application as to require a dismissal of the indictment.'"[4] We do not find the term so vague as to be constitutionally impermissable.

Appellants next assert errors relative to the indictment and the grand jury proceeding. They first claim prejudicial error in the failure to record the grand jury proceedings. We have recently held the failure to record grand jury proceedings is not error.[5]

It is next asserted the presence of the Assistant United States Attorney vitiates the aura of the grand jury as an independent body standing between the governmental prosecutory function and the citizenry. In this context it is asserted this is violative of Fifth Amendment protections. We cannot agree. F.R.Crim.P. Rule 6(d) specifically provides for the presence of attorneys for the government at grand jury proceedings. Indeed, the government attorney is essential to the fact presentation process by which the grand jury reaches its ultimate decision. Presentation of evidence for the grand jury's consideration is not in contravention of Fifth Amendment due process guarantees.

4/ United States v. Fortunato, 402 F.2d 79, cert. denied, 394 U.S. 933.

5/ United States v. Hedges, ___F.2d___, (10th Cir. 1972).

In a somewhat similar vein, it is asserted the presentation of matters to the grand jury by the United States Attorney or his assistant is in excess of statutorily authorized powers thereby rendering the indictment fatally defective. We have previously stated the government attorney is essential to the grand jury process and do not find error in the presentation of matters to the grand jury by the United States Attorney. 6/

It is also asserted the grand jury investigation was improperly conducted in that both the indictment and the superseding indictment were drafted and presented to the grand jury prior to its investigation. Citing Gaither v. United States, 413 F.2d 1061, 1069, (D.C.Cir. 1969), appellant Salazar maintains the "indictment is preceded by a grand jury investigation, at the close of which the grand jury votes to indict. The prosecutor then drafts an indictment." Gaither dealt not with the mechanics of an indictment drawn by the United States Attorney following the grand jury presentment which was signed by the grand jury foreman without submitting it to the remaining members of the grand jury. That decision dealt with the detrimental effect of an indictment which had been redrafted, altered or amended without prior resubmission and approval by the body of the grand jury. We find no error here in the preparation of the indictment before the grand jury's investigation as that body remains free to accept or reject all or any

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6/ See Application of United Electrical, Radio & Mach. Workers of Am., et al, 111 F. Supp. 858 (S.D.N.Y. 1953); United States v. Smyth, 104 F. Supp. 283 (N.D.Cal. 1952).

portion of the indictment it chooses.[7] In the grand jury process, one of the important essentials is the agreement of the requisite members of the grand jury before prosecution can be commenced.

There is next raised an assertion that the superseding indictment under which the convictions were returned is fatally defective and a denial of due process guarantees in that no evidence in addition to that presented in the original indictment proceeding was presented at the superseding indictment proceeding. We held in Edison v. United States, 272 F.2d 684 (10th Cir. 1959), that "[T]he grand jury having heard the witnesses once, it was not essential to the validity of the second indictment that they be recalled and give in the form of repetition the evidence previously given before the same grand jury. It was well within the province of the grand jury to return the second indictment without recalling the witnesses and hearing them anew."[8] The record before us indicates it was the same grand jury that returned both

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"It is common knowledge, to those who are familiar with the practice, that the District Attorney, or someone in his office, in a large percentage of cases, prepares the indictment, based upon information . . . which is subsequently submitted to, and if accepted by the grand jury as being supported by the facts, becomes the formal indictment." United States v. Brumfield, 85 F.Supp. 696, 704 (W.D.La. 1949).

8/

See also United States v. James, 290 F.2d 866 (5th Cir. 1961), cert.denied, 368 U.S. 834.

indictments; we therefore find no fatal defect in the superseding indictment.

Next, there are direct attacks by two of the appellants against the language employed in the superseding indictment. Appellant Donald Cooper contends the language of the first count charging misapplication of "funds or credits" is a duplicitous charge which fails to clearly inform him of whether he stands charged with misapplication of funds or misapplication of credits. This count of the indictment charges the single offense of conspiracy and is not duplicitous in its inclusion of two modes of misapplication under the statute.[9/]

It is also asserted the indictment is defective as being generally vague and ambiguous, failing to charge any offense, and being insufficiently informative of the charges to be faced by them. We have repeatedly held the test of sufficiency of the indictment is that "it contains 'the elements of offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense.'" United States v. Mason, 440 F.2d 1293 (10th Cir. 1971), cert. denied, ___U.S.___. The indictment here meets that test.

Donald Cooper next asserts error in the trial court's refusal of his motion for a bill of particulars. Granting or denying motions for bills of particulars is at the discretion of the court, and denial of such motion will not be disturbed on appeal unless that discretion was abused thereby denying the accused information

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9/ Mulloney v. United States, 79 F.2d 566 (1st Cir. 1935), cert. denied, 296 U.S. 658.

more specifically defining the offense charged against him. United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969). We find no error in the trial court's denial of the motion.

Appellants next raise arguments relative to various areas of improper and prejudicial joinder. The first improper joinder asserted is that of including the conspiracy charge and the separate substantive offenses together in the indictment. It is a general rule that "a conspiracy count may properly be joined with substantive counts where it is alleged and shown that the offenses are of the same or similar character and are based upon two or more acts or transactions connected together or constituting parts of a common scheme or plan." Miller v. United States, 410 F.2d 1290 (8th Cir. 1969), cert. denied, 396 U.S. 830. Inclusion in the indictment of the conspiracy count and the separate substantive counts was not improper under F.R.Crim.P. Rule 8(a). 10/

There are next asserted allegations of misjoinder of defendants under F.R.Crim.P. Rule 8(b). In this context it is urged the separate counts of the indictment did not name all the charged defendants, nor was there incorporation of individual counts with the remaining counts. The appellants contend the indictment charges various combinations of individuals with crimes committed in separate transactions without incorporating these separate charges into each other. In United States v. Jorgenson, 451 F.2d 516 (10th Cir. 1971), cert. denied, ___U.S.___,

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10/ See United States v. Scoblick, 225 F.2d 779 (3d Cir. 1955).

we held that joinder was proper where all the co-conspirators were familiar with the modus operandi of the fraudulent scheme even though all the co-conspirators were not present at each charged transaction.[11] There was sufficient evidence that the appellants were joint participants in the same act or transaction or series of acts or transactions to warrant their joint indictment. Refusal to sever was not reversible error.

It is also asserted the inherent prejudice to all the co-conspirators required severance under F.R.Crim.P. Rule 14. In Jorgenson we held the onus of showing prejudice under Rule 14 is on the movant and the granting or denial of the motion is within the trial court's discretion. We find no abuse of that discretion, therefore, we do not conclude there was improper joinder under Rule 14.

Donald Cooper next maintains that in the absence of severance from Salazar, a continuance should have been granted due to a highly publicized search of the building housing Salazar's offices, the arrest of certain individuals, including Salazar's daughter, for narcotics violations, and a suit filed by Salazar in response to the search and arrests, all of which occurred within the week preceding commencement of this trial. The prejudicial publicity argument presents two interesting variations from the usual situation presented in a contention of this sort. First, the subject of the publicity is not lodging the complaint, but rather a

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11/ See United States v. Hickey, 360 F.2d 127 (7th Cir. 1966), cert. denied, 385 U.S. 928.

co-defendant; ; secondly, the publicity is completely unrelated by way of subject matter to the upcoming trial, and is only an event which the news media felt worthy of some exposure. We held in Dennis v. United States, 302 F.2d 5, 8 (10th Cir. 1962), cert. denied, 384 U.S. 855, that "the mere fact of unfavorable publicity does not of itself raise a presumption of prejudice. . . . The prejudice must have manifested itself so as to corrupt due process." On this basis we do not find error in the trial court's denial of the motion for continuance.

Donald Cooper next asserts he was deprived of his right to a fair trial through the prohibition imposed by the trial court precluding him from making reference to a prior conviction of the co-defendant Norman. Cooper maintains this prohibition prevented him from testifying effectively as to the reasons for his actions and to further show his intent. We recently dealt with the rule providing for reception of evidence of other crimes in United States v. Burkhart, ___F.2d ___(10th Cir. 1972). The opinion there dealt extensively with the rule itself, its purpose and the inherent prejudice to one accused against whom such evidence is admitted. Nowhere in that rule do we see a blanket allowance of such evidence if presented by a co-defendant. This type of evidence, once admitted, from whatever source, is equally prejudicial to the accused. The trial judge's admonition here went only to disclosure of Norman's conviction. There was no restriction imposed precluding testimony relating to the transaction. This reflects a judicious limitation imposed by the trial court and we find no error in that limitation.

Appellant Donald Cooper next argues a determination made by the trial court in front of the jury was both prejudicial and an invasion of the jury function. The situation arose when Donald Cooper's attorney objected to a witness' testimony, concerning statements made to the witness by Salazar, as inadmissible hearsay as to Donald Cooper. The trial court overruled the objecting stating, "[T]here is evidence tying your client into count 1, the conspiracy. Once the conspiracy has been formed, hearsay is admissible." We held in Dennis v. United States, 346 F.2d 10, 15 (10th Cir. 1965), rev'd on other grounds, 384 U.S. 855, that "incriminating statements made by one co-conspirator during the pendency and in furtherance of a conspiracy are admissable as an exception to the hearsay rule once a conspiracy has been shown." The existence of the conspiracy was sufficiently established by independent evidence[12/] to warrant the allowance of this evidence, and such determination did not invade the jury function. Appellant also maintains the court prejudicially affected the weight of evidence by its characterization that items of evidence would be admitted "against" certain of the defendants. We do not feel the use of the word "against" is improper as emphasizing the evidence confronting the accused.

Error is next asserted relative to the trial court's instructions. Appellants maintain that certain of the instructions were improper and further that the trial court erred in refusing to

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12/ Glover v. United States, 306 F.2d 594 (10th Cir. 1962).

give certain instructions tendered by the defendants. The instructions given, when considered as a whole adequately explained the applicable law.[13]

Error is next predicated by appellants Donald Cooper and Salazar with respect to evidentiary matters. Salazar contends it was error to allow the jury to consider evidence relative to count two when he was not named in that count in the indictment and a mistrial was granted as to the only named defendant. The evidence relative to count two was relevant both to proof of the substantive offense and the conspiracy. The offense charged in count five was also charged as an overt act of the conspiracy. The evidence was properly received against Salazar in context of the conspiracy.

Evidence relative to three counts was received by the court then subsequently rejected and the counts dismissed or severed. The trial court instructed the jury to disregard this evidence in its deliberations. Donald Cooper asserts this evidence, once presented, denied him a fair and impartial trial. His contention is that it was a physical impossibility for the jury to disregard this evidence in its deliberations. It is presumed the jurors observed the instructions of the court and speculation that this was not done may not be employed in assailing their verdict.[14]

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[13] Jackson vs. Kansas City, Ks., 448 F.2d 518 (19 Cir. 1971).

[14] Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), cert. denied, 401 U.S. 1010; United States v. Perea, 413 F.2d 65 (10th Cir. 1969), cert. denied, 397 U.S. 945.

Two matters relative to the presentation of evidence to the jury are further raised as reversible error. Appellants first object to the summarization of the extensive bank records, accounting machine tapes, debit and credit slips and loan papers by the F.B.I. agent. They contend this is not a proper case for the use of a summary witness. We have long held that "a qualified expert may examine voluminous or intricate books and records and for the convenience of the court and jury give a summary of their contents ...." Hartford Acc. & Indemn. Co. v. Collins-Dietz-Morris Co., 80 F.2d 441 (10th Cir. 1935). The use of the summary witness was proper in aiding the understanding of the evidence presented.

Error is also asserted relative to the delivery to the jury by the trial court of a list of exhibits linking exhibits to specific counts of the indictment. We view this as being in the nature of summary of the evidence by the trial court which is permitted.[15/] We find no error, particularly in view of the record showing complete disclosure by the trial court of its intention to prepare the exhibit list. Following discussion, counsel for appellants approved of this, after being assured they would be permitted to see the list prior to its delivery to the jury.

Other points have been raised by appellants, including a contention the cumulative effect of the trial errors requires reversal. We have considered these other points raised and find them without merit.

Affirmed.

15/

See Davis v. United States, 227 F.2d 568 (10th Cir. 1955).

REVISED PAGES 2 AND 3

These are direct appeals from convictions of Donald, Delmar and Paul Cooper and Francis Salazar, as principals, and of George Norman, as aider and abettor for alleged misapplication of moneys of a statutorily defined insured bank in violation of 18 U.S.C. §656 and §2.

Twelve counts of the thirteen count indictment returned by the grand jury charged various of the appellants of separate transactions, each constituting a misapplication or embezzlement of funds of the insured bank. The first count of that indictment charged all the appellants with conspiracy to commit an offense against the United States in violation of 18 U.S.C. §371 and listed twelve transactions constituting eleven of the substantive counts as overt acts of the conspiracy. Five of the substantive counts were otherwise disposed of by dismissal or severance and were not considered by the jury. Of the remaining counts, guilty verdicts were returned under count one, the conspiracy charge, against Delmar and Donald Cooper and Salazar; against all three of the Coopers and Salazar on count five; and against Delmar and Donald Cooper and George Norman on counts eight and nine.

The Coopers and Salazar were officers and directors of the Rocky Mountain Bank at Lakewood, Colorado, the "insured bank" through which the alleged misapplication was committed. The scheme allegedly used involved the securing of borrowers by the Coopers and Salazar who would apply for loans from the Rocky Mountain Bank. The loan application would be presented to and approved by the Loan and Discount Committee of the bank, the membership of which

was partially comprised of various of the Coopers and Salazar. The loan proceeds were then paid the borrower by Donald or Delmar Cooper acting as an officer of the bank. The borrower would endorse the loan proceeds check and return it, usually to either Donald or Delmar Cooper. This money was then used for the private investment purposes of the Coopers and Salazar.

The charge against Norman is substantially similar with the exception that he was never an officer, director, employee or otherwise connected with the Rocky Mountain Bank. It is the government's contention that Norman, like the Coopers and Salazar, secured people who would apply for loans from the Rocky Mountain Bank, and after approval and payment of the loan proceeds would deliver the money to Norman for use by him in his own business ventures. The link connecting Norman as an aider and

ORDER DENYING PETITION FOR REHEARING

JULY TERM - AUGUST 25, 1972

Before Honorable David T. Lewis, Chief Judge, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable William H. Doyle, Circuit Judges

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee,	)
v.	) No. 71-1168
DONALD S. COOPER,	) No. 71-1169
FRANCIS R. SALAZAR,	) No. 71-1170
PAUL E. COOPER,	) No. 71-1171
DELMAR E. COOPER,	) No. 71-1172
GEORGE I. NORMAN, JR.,	)
Defendants-Appellants.	)

This matter comes on for consideration of motions for leave to file supplements to the petitions for rehearing filed by Donald S. Cooper and by Francis R. Salazar in the captioned cases. Upon consideration whereof,

IT IS ORDERED that the motions for leave to file the supplements are granted.

The Court also has for consideration petitions for rehearing, as supplemented, filed by all of the defendants-appellants in the captioned cases, together with suggestions for rehearing en banc filed by Francis R. Salazar and George I. Norman, Jr., in their individual captioned cases.

Upon consideration whereof, the petitions for rehearing are denied by Order of Circuit Judges Jean S. Breitenstein, Delmas C. Hill and Robert H. McWilliams, the panel who hears oral argument and to whom the cases were submitted.

The petitions for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of

Appellate Procedure), the Petitions for Rehearing En Banc are DENIED.

There are also pending motions for stay of mandate pending rehearing and, in event of denial, pending petitions for writs of certiorari to the United States Supreme Court. Upon consideration whereof,

IT IS ORDERED that the mandates in the captioned cases are stayed pursuant to Rule 41(b), Federal Rules of Appellate Procedure, until September 25, 1972 and if during the period of the stay there is filed with the Clerk of this Court a notice from the Clerk of the Supreme Court that the parties who have obtained the stay have filed a timely petition for the writ in that Court, the stay as to such parties shall continue until final disposition by the Supreme Court.

It is the further ORDER of the Court that the defendants-appellants in the captioned cases may remain free on their existing bonds until the appellate process reaches final disposition, or until further Order of this Court.

s/Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

STATUTES

18 U.S.C. Section 656 provides:

Theft, embezzlement, or misapplication by bank officer or employee - Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any

agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

As used in this section, the term "national bank" is synonymous with "national banking association"; "member bank" means and includes any national bank, state bank, or bank and trust company which has become a member of one of the Federal Reserve banks; and "insured bank" includes any bank, banking association, trust company, savings bank, or other bank institution the deposits of which are insured by the Federal Deposit Insurance Corporation. (June 25, 1948, c.645, §1, 62 Stat. 729.)

18 U.S.C. Section 371 provides:

Conspiracy to commit offense or to defraud United States - If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. Section 3500 provides:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do

not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means -

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub. L. 91-452, Title I, §102, Oct. 15, 1970, 84 Stat. 926.

18 U.S.C. Section 3481 provides:

Competency of accused - In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

SUPERSEDING INDICTMENT

COUNT I

The Grand Jury charges:

That from on or about the 7th day of October, 1965, and continuously thereafter up to and including the 16th day of April, 1969, within the District of Colorado, DELMAR E. COOPER, DONALD S. COOPER, PAUL E. COOPER, ALLEN R. HURT and FRANCIS R. SALAZAR, while being officers and/or directors of The

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Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, and GEORGE I. NORMAN, JR., wilfully and knowingly did combine, confederate and agree together and with each other, and with diverse other persons to the Grand jurors unknown, to commit an offense against the United States, that is, with intent to injure and defraud said bank, to wilfully misapply or cause to be misapplied approximately $700,000.00 of the moneys, funds or credits of said bank, a more particular description of such moneys, funds and credits being to the grand jurors unknown, in violation of Title 18, United States Code, Section 656.

a. It was part of said conspiracy for the defendants to knowingly and wilfully cause, allow and permit The Rocky Mountain Bank to lend money to individuals, without disclosing to said bank that said loans involved no bona fide transactions of said borrowers but were made for the use and benefit of the defendants.

b. It was a further part of said conspiracy for the defendants to knowingly and wilfully cause, allow and permit The Rocky Mountain Bank to lend money to corporations in which the defendants had an interest, without disclosing to said bank the interests of the defendants in said loans and corporations.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts

in furtherance of said conspiracy and to effect the objects thereof:

1. On or about the 7th day of October, 1965, within the District of Colorado, the defendant ALLEN R. HURT issued Cashier's Check #36479, in the sum of $30,000.00, payable to the order of Milton L. Huddleston, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

2. On or about the 15th day of October, 1965, within the District of Colorado, the defendant DELMAR E. COOPER issued Cashier's Check #36495, in the amount of $75,000.00, payable to the order of Central Distributing Company, Inc., drawn on The Rocky Mountain Bank, Lakewood, Colorado.

3. On or about October 19, 1965, within the District of Colorado, the defendant PAUL E. COOPER issued a check in the sum of $35,000.00, payable to Francis R. Salazar, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

4. On or about the 17th day of February, 1966, within the District of Colorado, the defendant DONALD S. COOPER issued Cashier's Check #37825 in the amount of $65,000.00, payable to the order of Harvey Alpert and Michael Cooper, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

5. On or about the 18th day of July, 1966, within the District of Colorado, the defendant DELMAR E. COOPER issued Installment Loan Dept. Cashier's Check #2123, in the amount of $25,000.00, payable to the order of J. Robert Jensen, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

6. On or about the 22nd day of September, 1966, within the District of Colorado, the defendant DELMAR E. COOPER caused to be deposited to the account of Greater Leasing Company, Inc., Account #17-847-4, The Rocky Mountain Bank, Lakewood, Colorado, the sum of $10,000.00.

7. On or about the 24th day of February, 1967, within the District of Colorado, the defendant DELMAR E. COOPER caused to be deposited to the account of Lakewood Medical Center, Inc., Account $21-016-3, The Rocky Mountain Bank, Lakewood, Colorado, the sum of $162,000.00.

8. On or about the 13th day of April, 1967, within the District of Colorado, the defendant DELMAR E. COOPER issued Cashier's Check #41855, in the amount of $33,165.89, payable to the order of J. Robert Jensen, drawn on The Rocky Mountain Bank, Lakewood, Colorado.

All in violation of Title 18, United States Code, Section 371.

COUNT II

The Grand Jury further charges:

That on or about the 7th day of October, 1965, within the District of Colorado, the defendant ALLEN R. HURT, being an officer, that is, Vice-President, and a Director of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud said bank, did wilfully misapply the sum of $30,000.00, of the moneys, funds and credits of said bank in that

he did cause to be made to his own benefit a loan of the $30,000.00 to Milton L. Huddleston and concealed his interest therein from the bank, in violation of Title 18, United States Code, Section 656.

COUNT III

The Grand Jury further charges:

That on or about the 15th day of October, 1965, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER, ALLEN R. HURT and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud said bank, did wilfully misapply the sum of $75,000.00, of the moneys, funds and credits of said bank, in that they did cause to be made to their own benefit a loan of the $75,000.00 to Central Distributing Company, Inc., and concealed their interests therein from the bank, in violation of Title 18, United States Code, Section 656.

COUNT IV

The Grand Jury further charges:

That on or about the 19th day of October, 1965, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER, PAUL E. COOPER, ALLEN R. HURT and FRANCIS R. SALAZAR, being Officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit

Insurance Corporation, with intent to injure and defraud said bank, did wilfully misapply the sum of $35,000.00 of the moneys, funds and credits of said bank, in that they did cause to be made to the benefit of the defendants DELMAR E. COOPER, DONALD S. COOPER, ALLEN R. HURT and FRANCIS R. SALAZAR a loan of the $35,000.00 to defendant PAUL E. COOPER and concealed the interests therein of the said defendants from the bank, in violation of Title 18, United States Code, Section 656.

COUNT V

The Grand Jury further charges:

That on or about the 17th day of February, 1966, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER, PAUL E. COOPER and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud said bank, did wilfully misapply the sum of $65,000.00, of the moneys, funds and credits of said bank in that they did cause to be made to their own benefit a loan of the $65,000.00 to Harvey Alpert and Michael Cooper and concealed the defendants' interests therein from the bank, in violation of Title 18, United States Code, Section 656.

COUNT VI

The Grand Jury further charges:

That on or about the 18th day of July, 1966, within the District of Colorado, the defendants

DELMAR E. COOPER and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, aided and abetted by defendant GEORGE I. NORMAN, JR., with intent to injure and defraud said bank, did wilfully misapply the sum of $25,000.00 of the moneys, funds and credits of said bank, in that they did cause to be made to the benefit of the defendant SALAZAR a loan of the $25,000.00 to J. Robert Jensen and concealed the interest therein of the defendant SALAZAR from the bank, in violation of Title 18, United States Code, Sections 2 and 656.

COUNT VII

The Grand Jury further charges:

That on or about the 22nd day of September, 1966, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, aided and abetted by defendant GEORGE I. NORMAN, JR., with intent to injure and defraud said bank, did wilfully misapply the sum of $35,000.00, of the moneys, funds and credits of said bank, in that they did cause to be made to their own benefit a loan of the $35,000.00 to J. Robert Jensen, and concealed their interests therein from the bank, in violation of Title 18, United States Code, Sections 2 and 656.

COUNT VIII

The Grand Jury further charges:

That on or about the 24th day of February, 1967, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, aided and abetted by defendant GEORGE I. NORMAN, JR., with intent to injure and defraud said bank, did wilfully misapply the sum of $81,000.00, of the moneys, funds and credits of said bank, in that they did cause to be made to their own benefit a loan of the $81,000.00 to Cloyd E. Wangsgard, and concealed their interest therein from the bank, in violation of Title 18, United States Code, Sections 2 and 656.

COUNT IX

The Grand Jury further charges:

That on or about the 24th day of February, 1967, within the District of Colorado, the defendants DELMAR E. COOPER, DONALD S. COOPER and FRANCIS R. SALAZAR, being officers and/or directors of The Rocky Mountain Bank, Lakewood, Colorado, a bank whose deposits were then insured by the Federal Deposit Insurance Corporation, aided and abetted by defendant GEORGE I. NORMAN, JR., with intent to injure and defraud said bank, did wilfully misapply the sum of $81,000.00 of the moneys, funds and credits of said bank, in that they did cause to be made to their own benefit

a loan of the $81,000.00 to Lakewood Medical Center, Inc., and concealed their interests therein from the bank in violation of Title 18, United States Code, Sections 2 and 656.